National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 9, 1998

TO: Louis J. D'Amico, Regional Director, Region 5

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Rotorex Co., Inc. and Fedders Corp., Case 5-CA-27338

530-6050-0825-3300, 530-6067-4011-1100, 530-6067-4011-4400, 530-6033-7056-8400

This Section 8(a)(3) and (5) case was submitted for advice on whether the Employer unlawfully eliminated a substantial majority of bargaining unit positions by "outsourcing" its remaining manufacturing operations, and otherwise bargained in bad faith and unlawfully locked out unit employees.[1]

The Employer manufactured and assembled air conditioning compressors for its parent company Charged Party Fedders. There are 39 component parts in the Fedders compressor, and until the events in this case, the Employer had itself manufactured seven of these parts: vanes, two flanges, shafts, rollers, cylinders, and the case. The Union represented approximately 390 production and maintenance unit employees, including approximately 250 - 280 employees working in the machine shop manufacturing the above parts.

The parties' last bargaining agreement, which expired on August 17, 1997, contained a provision requiring that production work "normally done by the bargaining unit shall be done solely by members of the Union . . ." Although this language apparently prohibits subcontracting, for many years the Union allowed the Employer to supplement its production by bringing in purchased compressor parts. The Union asserts that this past subcontracting never resulted in unit employee layoffs, and unit employees also had all the overtime they desired. The Union thus saw no need to file grievances over this subcontracting.[2]

Contemporaneous with the parties' bargaining for a new agreement, the parties also arbitrated a grievance involving the Employer's use of subcontractors to perform maintenance work while denying overtime work to unit maintenance employees. The Employer notes that "outsourcing" of compressor parts, i.e., the purchase of completed parts, and "subcontracting" of parts, i.e., using in-plant outside contractors to perform manufacturing work, were not an express subject of this arbitration. However, the arbitral decision which eventually issued specifically addressed these types of subcontracting.

The arbitrator concluded that the bargaining agreement required the Employer to offer unit work to unit employees; that there was insufficient evidence of a contrary past practice which effectively modified this obligation; and that the Union had not waived its right to be offered unit work by its past failure to grieve prior incidents of subcontracting. The arbitral decision, which issued on September 12 long after much of the Employer conduct addressed in these charges, ordered the Employer to refrain from subcontracting or "outsourcing" production work normally done by unit employees, assuming the employees were available to perform such work. The Union currently is attempting to enforce this arbitral decision in federal district court.[3]

The parties began negotiations for a new agreement on June 27, 1997, and held 14 negotiation sessions before the current agreement expired on August 17. There were two main issues in these negotiations: subcontracting and employee transfers. The Employer proposed new language according itself the right to "subcontract and outsource any and all such operations." The Union opposed that proposal stating that it would be like giving all the unit employees' jobs away. The Employer alleges that the Union stated during negotiations that the Employer already had the right to outsource. The Union asserts, however, that it also said that the parties were awaiting the arbitral decision and should let the chips fall where they may. Regarding employee transfers, the Employer proposed the right to move employees to different plant jobs as needed. The Union's initially proposed maintaining the current "volunteer" system, but eventually offered to allow forced transfers within a department. The parties' negotiations produced only a few agreements, apparently on only minor items.

From July 27 through August 17, the plant temporarily ceased operations pursuant to its annual shutdown. In early August, the Employer informed the Union that current production of shafts and rollers was being eliminated, resulting in layoffs. When the Employer began informing affected employees about the production elimination, the Union objected that the Employer was not effecting layoffs in accordance with seniority. The Employer recontacted affected employees and provided them bumping rights in accord with the parties' agreement. It appears that a total of 68 machine shop employees were laid off as a result of the permanent subcontracting of the shafts/rollers.

Meanwhile, the parties' negotiations periodically revisited the issues of subcontracting and employee transfers, with little progress. On August 16, the Employer provided its last, best and final offer, which the Union rejected. The Union requested an extension of the agreement set to expire midnight, August 17. The Employer rejected this request and the Union instituted a strike at that time. At a bargaining session held on August 25, the parties made no progress. The Union states that at this meeting the Employer formally notified the Union that 68 unit positions had been eliminated by the previous subcontracting of the shafts/rollers.

On September 5, the Employer notified the Union that the Employer's outstanding final contract offer would expire on September 8, and might then be replaced with a more regressive proposal. The Union did not respond. On September 8, the Employer concluded that the parties were at impasse on the issues of subcontracting, employee transfers and wages, and implemented its final proposals on these matters.[4] On September 9, the Employer sent the Union a new proposal which was substantially regressive. This proposal eliminated union-security, dramatically expanded management rights, and contained other changes not previously discussed.

On September 12, the Union made an unconditional offer to return to work on behalf of the employees. The Employer responded by imposing a lock out until such time as the parties reached a new agreement.

On September 15, the parties received the September 12 arbitral decision barring Employer subcontracting of unit work without first offering that work to unit employees. Thereafter, on September 19, the Union requested an extensive amount of information concerning Employer subcontracting. The Employer denied these requests for information as irrelevant.

On September 29, the Employer notified the Union of the elimination of all 275 machine shop positions. The Employer stated that, due to the strike, it had accelerated its efforts to outsource, resulting in this employment reduction. When the parties met the following day, the Employer stated that it had been outsourcing for three years in an effort to be competitive as an "assembly only" plant, and that the Union had been aware of these efforts. The Union replied that prior outsourcing had not resulted in unit job loss. The parties then reviewed the Employer's new regressive proposal. To date, the Employer has continued the lockout of its remaining 150 non-machine shop assembly workers, and also has not changed its position regarding the elimination of the 275 machine shop positions.

On October 15, after the instant charges were filed, the Union made another request for information which the Employer also declined to provide.[5] To date, the Employer has continued to lockout the remaining 150 assembly line workers.

The Union asserts that the Employer made its decision to subcontract out all its machine shop work during the expired contract, and before negotiations for a new agreement had even begun, based upon labor costs. A former manager for the Employer states that he was told in January 1997 that, during the annual plant shutdown in the summer, he should not schedule any maintenance work on the equipment used for flange production, even though that equipment sorely needed maintenance. This former manager also states that it was common knowledge in early 1997 among Employer managers that the Employer had decided to outsource all production and eliminate the production line.

The Employer asserts that its final decision to subcontract the balance of machine shop work, viz., the vanes, case, cylinders and flanges, was a mere continuation of the course it had set upon several years earlier to become an assembly-only plant. The Employer thus argues that its latest subcontracting was one part of an overall fundamental change in the scope and direction of its business, viz., eliminating its machine shop. The Employer asserts that its decision was not motivated by labor costs, stating that its machine shop equipment was outdated and would require a $50 million capital investment to be competitive.

The Union asserts that not all of the Employer's machinery was outdated and in need of immediate replacement. First, as noted

above, the Employer was intentionally not performing necessary maintenance work on its equipment. Thus, at least some of the problems of excess scrap experienced by the Employer may well have been attributed to intentionally poor maintenance. Second, in the pretrial discovery proceedings in it's WARN suit, the Union obtained documents casting serious doubt upon the Employer's bare assertion that it subcontracted the machine shop work to avoid the necessity of investing $50 million in required new equipment.

The Union obtained the Employer's subcontracting agreement with F & M Manufacturing for production of finished cylinders. Under this agreement, the Employer is leasing to F & M the Employer's own cylinder manufacturing equipment. The Employer also agrees to provide to F & M another new machine which the Employer ordered at a cost of between $500,000 and $1 million. It also appears that the Employer provided to Everite Machine Products, one of the subcontractors who is now making flanges, the Employer's own equipment used for that purpose. The Union obtained an "Inspection Tool Log-out Sheet" dated October 30, 1997, pursuant to which the Employer issues to Everite some of the Employer's own flange producing equipment.

We conclude that the Employer violated Sections 8(a)(3), 8(a)(5)-8(d) as follows:

1) the subcontracting of shaft/roller work in August constituted a unilateral change in violation of Section 8(a)(5), and also violated Sections 8(d)-8(a)(5) as a modification of the parties' bargaining agreement, as interpreted by the arbitrator. The Union did not waive its bargaining rights by its failure to grieve prior subcontracting, or by statements made during negotiations.

2) the September 29 permanent subcontracting of the remaining machine shop work violated 8(a)(5) as not privileged by the impasse-implemented subcontracting proposal. This decision otherwise encompassed a mandatory subject, even assuming that it amounted to a transfer of work rather than pure subcontracting, because it did not effectuate a change in the scope of nature of its business, turned on labor costs, and was otherwise amenable to bargaining.

3) the September 9 regressive proposal violated 8(a)(5);

4) the September 12 lockout violated 8(a)(5);

5) the September 29 permanent subcontracting of the remaining machine shop work occurred post-lockout and thus violated Section 8(a)(3) as inherently destructive of Section 7 rights;

6) regarding Union requested information: the Employer unlawfully failed to supply the relevant information of September 19, and the Region should proceed on any relevant information requested on October 15, absent evidence that this request was solely for purposes of discovery.

1. Mid-term Subcontracting of Shafts and Rollers

We conclude initially that the August subcontracting of the shaft/roller work was a unilateral change in violation of Section 8 (a)(5). Although the Employer has a prior history of subcontracting, it adduced no evidence of any prior subcontracting which resulted in substantial, permanent unit employee layoffs. Thus, the shaft/roller subcontract, resulting in the permanent layoff of 68 employees, clearly amounted to a change in the Employer's prior subcontracting practice. We next conclude that this subcontracting decision encompassed a mandatory subject of bargaining[6] because it did not constitute a change in the "scope or direction of the enterprise."[7] To the extent that the Employer argues that this decision was not mere subcontracting, we would next analyze the decision under the Board's decision in Dubuque Packing[8] and find a violation. SEE discussion infra concerning the mandatory nature of the Employer's later decision on September 29 to subcontract the remainder of its machine shop work.

We next conclude that the Union did not waive its right to bargain over this subcontracting decision. A union's bargaining waiver will not be not lightly inferred and must be clear and unmistakable.[9] The Union here did not clearly waive its bargaining rights by the applicable provision in the parties' bargaining agreement, nor by either its statements during bargaining or its failure to grieve prior subcontracting.

In AGA Gas,[10] the union had been aware of prior subcontracting during peak periods. The union nevertheless filed no grievances, and later stated that it believed the bargaining agreement did not prohibit such a practice. Subsequently, the employer began using non-unit employees to perform regular unit work. The ALJ, adopted by the Board, found that information relating to that subcontracting was relevant and suppliable upon request, because the union had not waived its bargaining rights.

The ALJ first noted that the management-rights clause in the parties' bargaining agreement did not "expressly permit the assignment of work to nonunit personnel. Indeed, it is arguable that the management-rights clause . . . restricts management's power to assign unit work only to unit employees . . ." The provision governing unit work in the parties' bargaining agreement here also did not amount to a Union waiver, and instead provided that production work "normally done by the bargaining unit shall be done solely by members of the Union . ." Id. At 1330. Moreover, the September arbitral decision interpreting that language specifically found that it barred unilateral subcontracting, and obligated the Employer to first offer unit work to unit employees.

The ALJ also found that the Union did not otherwise waive its bargaining rights by its failure to protest prior subcontracting:

The Union's toleration of occasional subcontracting in peak periods, and its conclusion that it could not win a grievance over such subcontracting, cannot be construed as the requisite "clear and unmistakable" waiver or "conscious relinquishment" of its statutory right to bargain over an entirely different type of work reassignment. Id. At 1330.

In the instant case, the Union failed to grieve prior subcontracting which the Employer has not shown also resulted in substantial, permanent layoffs. The Union's failure to grieve subcontracting in those different circumstances does not constitute a clear waiver.[11] For the same reason, the Union's statements, made during negotiations that the Employer always had the right to subcontract, also does not amount to a clear waiver vis-…-vis all subcontracting. Moreover, on at least one of these occasions, the Union referred to its then pending arbitration over Employer subcontracting. This explicit reference to the Union's outstanding objection to that form of subcontracting precludes finding that the Union's contemporaneous statements were a clear waiver of bargaining over all subcontracting.

We also conclude that the Employer's shaft/roller subcontract modified the parties' contract in violation of Section 8(a)(5)-8(d). It is well established that an employer violates Section 8(a)(5)-8(d) when, without the consent of the union and during the term of the parties' bargaining agreement, it modifies contractual terms and conditions of employment, or otherwise repudiates its undertakings under the collective-bargaining agreement.[12] Here, the Employer's subcontracting of the shaft/roller production work was in clear derogation of the bargaining agreement, as interpreted by the arbitrator. Moreover, this subcontract was not a "mere breach" of the contract, because the Employer was contending that it had the absolute right under the contract to engage in this type of subcontracting[13].

2. Elimination of Machine Shop

Next, we conclude that the Employer's September 29 announced elimination of the entire machine shop violated Section 8(a)(5) because (a) it was not privileged under the impasse-implemented subcontracting provision because of the absence of a good faith impasse; and also (b) that proposal could not be implemented without also bargaining to impasse over subcontracting procedures and criteria; and (c) we reject the Employer's argument that this decision did not encompass a mandatory subject of bargaining because it was akin to a partial closing under First National Maintenance.[14]

a. Employer did not bargain to a good faith impasse.

The Board has consistently held that a "legally cognizable" or "bona fide" impasse does not exist when the employer has failed to purge itself of prior unfair labor practices that adversely affect the bargaining process.[15] Thus, an employer cannot parlay an impasse resulting from its own misconduct into a license to make unilateral changes.[16]

Here, the Employer bargained to impasse in substantial part because it sought the absolute right to subcontract any and all unit work. The Employer maintained this bargaining position in the context of its unilateral subcontracting of the shaft/roller work, and permanent layoff of 68 employees, in violation of the parties' agreement and Sections 8(a)(5) and 8(d). This prior unlawful

conduct adversely affected the bargaining impasse because it placed the Union in an unlawfully weak bargaining posture vis-a-vis the Employer's impasse demand over the same subject matter, subcontracting. Since the parties had not reached a good faith impasse over subcontracting, a fortiori the Employer unlawfully implemented its impasse proposal over permanent subcontracting.[17] We also conclude that the Employer's permanent subcontracted was not privileged by any Union waiver, as noted supra regarding the unilateral subcontracting of shafts/rollers.

b) Impasse subcontracting proposal not lawfully implemented

To the extent that the Employers' proposal for unilateral authority to subcontract employees work is a mandatory subject of bargaining under McClatchy Newspapers,[18] we also conclude that the Employers were not privileged to implement it without first bargaining to impasse over subcontracting procedures and criteria.

In Colorado-Ute,[19] the Board concluded that an employer lawfully can insist to impasse on a merit pay proposal affording unlimited discretion to determine merit wage increases, but that a bargaining impasse did not privilege the employer's unilateral exercise of such unlimited discretion.[20] The Board subsequently refined its reasoning in McClatchy Newspapers, where it concluded that discretionary merit increase proposals, where there has been no good faith bargaining over criteria and procedures, timing and amounts, fall into the narrow class of mandatory subjects that cannot be implemented after impasse, i.e., that such a proposal constitutes an exception to the "implementation after impasse" rule. The Board held that unilateral implementation of such proposals -- even after good-faith impasse -- is inconsistent with the employer's established duty to bargain over procedures and criteria for determining merit increases for bargaining unit employees. Thus, the Board concluded that the "open-ended, intermittent disruption of collective bargaining" resulting from entirely discretionary shifts in wage rates was "inimical" to the policies of the Act because the employer's unilateral actions bypassed and disparaged the union as the employees' bargaining representative. 321 NLRB at 1391.

Similarly here, the Employers proposal afforded unfettered discretion to subcontract "any and all" operations. Despite this autonomy, the Employer did not offer to bargain with the Union over the procedures it would follow in subcontracting. Consequently, under the framework set forth in McClatchy Newspapers, although the Employer could lawfully bargain to impasse for unilateral control over subcontracting, we conclude that it could not lawfully implement its proposal without first reaching a good-faith impasse over procedures and criteria.

c). Decision to eliminate of machine shop was mandatory subject of bargaining

In First National Maintenance, the Supreme Court held that an employer's decision to close down part of its business was not a mandatory subject of bargaining, because it was a decision "akin to the decision whether to be in business at all" and, in that situation, the "harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision. . ." 452 U.S. at 677, 686. The court left Fiberboard intact, and stated that each case involving economic decisions that impact employees, "such as plant relocations, sales, other kinds of subcontracting, automation, etc." must be considered on its particular facts to determine whether "the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business." 452 U.S. at 679, 686, n. 22.

More recently, in Dubuque Packing,[21] the Board enunciated the following test for determining whether a work relocation decision is a mandatory subject of bargaining: The General Counsel has the initial burden of showing that the decision was "unaccompanied by a basic change in the nature of the employer's operation." The Employer then has the burden of rebutting the General Counsel's prima facie case or proving certain affirmative defenses. Where the Board concludes that the employer's decision concerned the "scope and direction of the enterprise," there will be no duty to bargain over the decision.[22] The Employer also may offer affirmative defenses that (1) labor costs were not a factor in the decision or (2) even if labor costs were a factor, the union could not have offered labor cost concessions that could have changed the employer's decision.[23]

Although Dubuque Packing specifically concerned work relocation decisions, we have applied its principles to other "Category III" decisions -- decisions that have a direct impact on employment but have as their focus the economic profitability of the employing enterprise[24] -- that fall within the spectrum between Fibreboard and First National Maintenance.[25]

Here, the Employer did not merely subcontract a portion of its work at its facility and under its direct control, but closed its machine shop and subcontracted the balance of its manufacturing operation. Thus, it could be argued that the Employer's decision is not precisely within the parameters of Fiberboard. On the other hand, the Employer has not gone out of even a portion of its business, but rather has merely subcontracted with other companies to provide it with parts manufactured according to its designs and specifications, and in some instances with its own former machines. The Employer will continue to sell finished compressors to its customer, Fedders. Thus, the Employer's decision is not the kind of "partial closing" - or going out of part of a business - that was at issue in First National Maintenance.

We therefore conclude that, in addition to Fibreboard, the Region should also apply the Dubuque test, first arguing that the Employer's final subcontracting of the rest of its machine shop work did not significantly change the nature or direction of its business. The decision also necessarily turned on labor costs, since the Employer permanently laid off around 275 employees. Thus, the decision was highly amenable to collective bargaining. In First National Maintenance, the Supreme Court held that Category III decisions that are amenable to collective bargaining should be bargained unless bargaining would place a burden on the conduct of the business that outweighed its benefits. Applying this analysis in Otis Elevator[26] and its progeny, the Board held that Category III decisions that turn on labor costs cannot constitute the kind of change in the scope or direction of a business that should be considered too entrepreneurial to be subject to a bargaining obligation.[27]

As already noted above, the Employer's decision was not the kind of "partial closing" -- "akin to a decision whether to be in business at all" -- that would constitute a change in the scope or direction of the enterprise under First National Maintenance. The Employer has not gone out of the business of supplying compressors to Fedders. Rather, it is having the component parts manufactured for it, pursuant to its designs and specifications and with some of its equipment, for later assembly and sale.

In Bob's Big Boy, supra, the employer discontinued the shrimp processing part of its food processing operation, sold the processing equipment, and subcontracted to have another company provide processed shrimp to its restaurants. The Board held that that was a mandatory subject of bargaining because the employer had not changed the nature and direction of its business since it was still in the business of providing foods, including processed shrimp, to its restaurants. The employer had not closed a "separate and distinct" business, but had just subcontracted an integral part of its business. The Board distinguished First National Maintenance, Kingwood Mining, 210 NLRB 844 (1974), enfd. 90 LRRM 2844 (D.C. Cir. 1975)(employer closed coal mining operations and expanded independent coal processing operations), and General Motors, 191 NLRB 951 (1971) (employer sold dealership), because those cases involved the complete termination of a business independent from the rest of the employer's operation.[28]

In Michigan Ladder,[29] the employer stopped manufacturing ping pong tables and ladder parts, and contracted with a subcontractor to manufacture those items at the employer's facility. The employer leased its equipment to the subcontractor and paid for the finished product. Although the product had to be produced to the employer's specifications, the subcontractor had the contractual right to direct the method of production. The ALJ, upheld by the Board, rejected the employer's assertion that it was no longer in the business of manufacturing tables and ladder parts and therefore had changed the scope or direction of its business. Rather, since the employer still marketed and distributed tables and ladders which it was having manufactured subject to its ultimate control, its decision to subcontract was a mandatory subject of bargaining.

In Textron Lycoming, supra, we concluded that an employer's decision to subcontract the manufacturing of the engine component parts it used in the assembly and servicing of airplane engines was a mandatory subject of bargaining. The employer had laid off 300 employees, approximately one-half the unit, and intended to dispose of machinery and equipment and close a building at one facility. Relying on Fiberboard and Bobs Big Boy, we concluded that there had been no change in the direction of the business since the employer still sold engines and serviced them as before, using the component parts it now purchased from a subcontractor, and did not terminate a product or a service.[30]

As in the above-described cases, the Employer here will continue to procure the manufacturing and then will continue to assemble its traditional product, and market and sell it to its traditional customer. It has not closed a separate and distinct business, but has merely subcontracted an integral part of its business. Therefore, it has not changed the nature or direction of its business so as to remove the decision to subcontract from the bargaining obligation.

The cases where subcontracting decisions have been held non-bargainable because they involved major changes in the

enterprise are distinguishable. In Adams Dairy,[31] for example, the employer terminated the distribution part of its dairy business, contracted with independent distributors to deliver milk to retailers, and terminated its driver-salesmen. The Eighth Circuit, reversing the Board, held that a "basic operational change" had taken place in that the dairy "liquidated that part of its business handling distribution of milk products."[32] However, in Adam's Dairy the employer did not subcontract a part of its operation on which it relied in conducting the rest of its operation. Adam's Dairy had nothing whatever to do with its product once the milk was sold to the Independent Distributors, who took title to it and sold it to whomever, and however, they chose. Thus, the decision to cease milk distribution was akin to a decision not to be in part of the business, rather than to subcontracting an integral part of the business. In the instant case, the subcontractors manufacture necessary parts for the Employer, and the Employer assembles and sells these parts to its customers. As in Fiberboard, the Employer merely is using different employees, employed by a subcontractor, to perform the work that must be performed in order for the Employer to conduct its ongoing business.

In Garwood-Detroit Truck Equipment,[33] the employer, which had sold parts for trucks and installed them on the trucks, contracted with independent contractors to do the installation and service work at the employer's facility. The Board held that that was not a mandatory subject of bargaining in part because the employer's "abandonment" of one aspect of its business, even though that aspect was continued by independent contractors, was a significant change in the nature of the business. However, the subcontracting arrangement in Garwood-Detroit -- whereby the independent contractors paid rent to the employer, to use its facilities and equipment, in return for the exclusive right to work directly for the customers in installing the employer's parts -- was more akin to an employer's "going out of a part of its business" than where an employer contracts with subcontractors to manufacture parts the employer has designed and will assemble and sell to its customer. Moreover, the decision in Garwood-Detroit was based largely upon the Otis dichotomy: the employer's decision was considered to be a change in the direction of the enterprise because it did not turn on labor costs, although labor costs were a factor, but on massive overall overhead costs. To the extent that the Otis dichotomy is still valid, the decision in the instant case did turn on labor costs. If the dichotomy is no longer valid, the heavy reliance in Garwood-Detroit on that dichotomy undercuts its relevance in determining whether the employer's decision to "abandon its service and mounting operations" was the kind of change in the nature of the business that would defeat the General Counsel's prima facie case under Dubuque.

In Kroger Company,[34] the employer closed its "nest-run" egg processing facility (which utilized eggs obtained from farmers), and began obtaining finished eggs for its grocery stores from an "integrated" egg processor, which used its own hens at the processing facility, because the supply of unfinished eggs not being used by integrated processors had decreased and become inordinately expensive. The Board held that the decision to close was not a mandatory subject of bargaining, in part because the decision represented a change in the nature of the employer's business in that the employer no longer operated any egg processing facility.[35] However, in Kroger the employer did not merely subcontract the work previously performed by the employer's employees, but began purchasing eggs, from a company that was producing them in a substantially different manner, in order to terminate an outmoded operation.[36] Thus, the decision was similar to an employer's decision to introduce a different method of production or operation into its own enterprise, which would be an entrepreneurial decision outside the bargaining obligation.[37] In the instant case, the Employer merely has subcontracted with other companies to manufacture its products in substantially the same manner as the Employer had manufactured them, and sometimes with the Employer's own equipment.

Finally, in Fraser Shipyards,[38] the employer was in the business of repairing, maintaining. constructing and converting marine vessels, while also engaging in sporadic machinery work. During negotiations, the employer announced that it wanted to close its machine shop and subcontract all of the work. The employer cited a paucity of business due to the recession, and also the substantial capital required to modernize its outdated equipment.[39] The Board held that this was a nonmandatory decision because it was not motivated by labor costs. The instant case is clearly distinguishable as not involving similar a "lack of business" non-labor cost factor.

The Employer asserts that its closing of the machine shop and selling or leasing of the equipment involved a substantial capital restructuring, which demonstrates that it made an entrepreneurial decision which should not be subject to bargaining. In Bob's Big Boy, supra, the Board acknowledged, consistent with Fibreboard, that the substantiality of the capital transactions involved was "a factor" to consider. The Board found there that the capital transactions involved in shutting down the employer's shrimp processing capabilities were not substantial enough to remove the decision from the bargaining obligation, since there were no immediate capital changes, the employer retained possession of some equipment it used elsewhere in its facility, and there

were no major changes in the facility. In contrast to Bob's Big Boy, the instant case involves total closure of a manufacturing operation, viz., the machine shop, and the sale or lease of more equipment.

However, the Region should argue that the degree of capital investment or withdrawal has never been dispositive in finding this kind of decision to be mandatory or nonmandatory.[40] The Dubuque test was enunciated specifically to deal with relocations that, by their very nature, involving closures of facilities and other major changes, encompass substantial capital transactions. It is those transactions that distinguish relocations and other employer decisions from simple Fibreboard subcontracting, which is deemed mandatory without the Dubuque analysis.[41] The fact that the Employer's decision here involved some capital transactions arguably makes this a case appropriately analyzed under Dubuque, rather than Fibreboard, but does not, independent of other rationales, require a finding that the Employer has changed the nature or direction of its business.

Having concluded that we can establish a prima facie case under Dubuque, we further conclude that the Employer likely will not be able to establish either of the Dubuque affirmative defenses. With regard to whether labor costs were a factor in the decision, the Employer has eliminated substantial labor costs by laying off around 275 employees. The Employer has not contended that these labor cost savings were insignificant in its decision. Rather, the Employer merely stated that for a long time it had been seeking to get out of the manufacturing aspect of its business and become an "assembly-only" plant, and that the Union's strike merely hastened that decision. Implicit in the Employer's own rationale is the fact that the Union's strike, and hence labor costs, were a factor in its decision.

The Employer lastly has contended that it would require a $50 million capital investment to have made its machine shop competitive. However, the Employer has only made this bare assertion which otherwise is seriously undermined by several factors. First, the poor performance of the Employer's machinery equipment clearly was due at least in part to intentionally omitted necessary maintenance. Second, the Employer provided this same equipment to one subcontractor, F&M Manufacturing, and was willing to purchase a new machine for another subcontractor, Everite Machine Products. This strongly suggests that: (1) the Employer's current equipment is totally acceptable; and (2) the Employer otherwise is willing to expend finances for new equipment, where needed. The Employer thus only finds its equipment unsuitable, and capital expenditures too burdensome, for its own employees. Moreover, the Employer has not established the immediate need for substantial capital expenses to replace equipment. In sum, the subcontracting of the balance of machine shop work encompassed a mandatory subject of bargaining.

3. September 9 Regressive Proposal Was Bad Faith Bargaining

A party's withdrawal of its agreement on an issue and substitution of a regressive proposal is often considered an indicium of bad faith, but not a per se violation.[42] Regressive bargaining must be examined in the context of the parties' negotiations. In considering a party's justification for a change in proposals, the Board has held that although the reasons need not be totally persuasive, they must not be "so illogical as to warrant an inference that by reverting to these proposals [the party] has evinced an intent not to reach agreement and to produce a stalemate in order to frustrate bargaining."[43]

The Board has found bad-faith bargaining where an employer's proposals and bargaining tactics, taken as a whole, evidenced an intent not to reach agreement.[44] Thus, an employer may violate Section 8(a)(5) when it makes regressive proposals without a logical explanation or in the context of other unfair labor practice conduct.[45] However, the Board generally finds regressive proposals to be lawful where they are preceded by good-faith bargaining, relate to an intervening change in the employer's circumstances (such as the successful weathering of a strike) or otherwise have a logical justification.[46] For example, in Challenge-Cook Bros.,[47] the Board held that the employer did not violate Section 8(a)(5) when it altered its bargaining position after the beginning of a strike. Specifically, the employer withdrew its retroactive pay and pension proposals and, for the first time, announced its desire to eliminate the union security clause in the contract. The Board found this to be a "reasonable reaction" to the strike, noting that there was no evidence that the employer asserted its proposal disingenuously or that it was unwilling to discuss it with the union. Id. at 388-389.

In the instant case, we note that the Employer did successfully weather the Union's strike. However, prior to making its substantially regressive proposals, the Employer also engaged in unlawful subcontracting in derogation of the parties' extant agreement. The Employer thereafter failed to bargain to a good faith impasse because of this unlawful conduct.[48] In

addition, the Employer did not experience any change in economic circumstances, other than the strike, to justify its regressive proposals. The Employer offered no rationale for seeking the elimination of union-security. More importantly, it has not explained any need for the substantial expansion of management rights beyond the unfettered right to subcontract which the Employer had already proposed and implemented.

In Barry-Wehmiller, supra, the Board noted that the employer's regressive proposals were not lawful, even though they reflected increased economic power following the successful weathering of a strike:

Moreover, in addition to the flexing of its economic muscle, the Respondent had specific reasons for changes in its proposals. Some were revisions to earlier or original proposals which it had modified in attempting to secure agreement without a strike; thus the basis for those concessions no longer existed. Some were engendered by circumstance relating to the strike (e.g., paying employees for time spent in negotiations). Id at 472-3.

In contrast, the Employer here has offered no explanation for the necessity of its harshly regressive proposals. To the contrary, the Employer expressly warned the Union that a failure to accept the Employer's impasse proposal might result in a regressive proposal. The Employer's regressive proposals thus were expressly intended to force the Union into accepting the impasse proposal, which we already have found did not the result in a good faith impasse. The Employer's regressive proposals, in support of a bad faith impasse, thus could not foster agreement, but rather frustrated bargaining.

We therefore conclude that, by making these regressive proposals without a rationale, in the context of unlawful unilateral changes and the absence of a good faith impasse, the Employer indicated its intention to frustrate good faith bargaining and the eventual reaching of an agreement, in violation of Section 8(a)(5).

4. Unlawful Lockout in Support of Impasse

A lockout may be lawful, despite employer unfair labor practices, if the lockout is "solely" in support of a "legitimate bargaining position"[49] and not materially motivated by the unfair labor practices.[50] The Board considers a lockout to be in support of bad faith bargaining where that bargaining has such an impact on otherwise lawful negotiations that, had it not occurred, the parties would likely have reached agreement and the lockout would have ended.[51] For example, in Movers & Warehousemen's Assn.,[52] the Board found a lockout unlawful because it was in support of the employer's unlawful bargaining demand for a nonmandatory subject.[53] On the other hand, in Hess Oil, where the employer unlawfully insisted on a change in the scope of the unit, the Board nonetheless found that the lockout was lawful, because this insistence had not caused the impasse in negotiations.[54]

In the instant case, when the Union offered to end its strike on September 12, the Employer imposed a lock out until the parties reached a new agreement. The lockout thus was in direct support of the Employer's bargaining position, including its regressive proposals, as well as its impasse proposal on subcontracting which the Employer had previously implemented on September 8. As noted supra, the parties had not reached a good faith impasse, and the Employer's regressive proposals also violated 8(a)(5). Since the lockout was in support of this bad faith bargaining position, a fortiori the lockout violated Section 8 (a)(5).

5) Post Lockout Permanent Subcontracting Violated Section 8(a)(3) as Inherently Destructive of Section 7 Rights.

We conclude, in agreement with the Region, that the permanent subcontracting, post lockout, was inherently destructive of employee rights in violation of Section 8(a)(3).[55]

6) Union Requested Information: September 19 and October 15

Regarding the requests for information on September 19, we conclude, in agreement with the Region, that the Employer unlawfully failed to supply the information found relevant by the Region.

Regarding the request on October 15, we note that the Board makes an exception to the general "discovery" standard set forth in Acme[56] where the requesting party does not intend to use the information for the purposes of collective bargaining. In

Coca Cola Bottling,[57], the Board found that the employer lawfully refused to provide information concerning retirement benefit costs where it was demonstrated that the union sought this information in order to communicate it to the employer's competitors, not to fulfill any bargaining responsibilities with the employer. The Board determined that the union did not have a legitimate collective bargaining purpose in seeking the information, and thus was not entitled to receive it. 311 NLRB at 425-26. Further, in WXON-TV[58], the Board held that the union was not entitled to information regarding the termination of bargaining unit employees and the performance of bargaining unit work by nonunit employees because the request was made "akin to a discovery device" pursuant to its pursuit of the unfair labor practice charge rather than its statutory duties as collective bargaining representative. 289 NLRB at 617-18.

The Employer argues that the October 15 information was requested in the nature of discovery after the union filed the instant charges. However, some of this information may well be relevant to the Union's 9(a) function. Thus, absent evidence that the Union requested relevant solely for purposes of discovery in the Board charge, the Region should issue complaint.

B.J.K.

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[1] [FOIA Exemption 5]

[2] The Employer notes that in the last 10 years, the bargaining unit shrank from around 900 to 400 employees. However, the Employer adduced no evidence showing that its prior subcontracting had an adverse impact upon the unit. The Union also argues that unit attrition over the last 10 years may have resulted from causes other than subcontracting, e.g., increased automation.

[3] The Union also has filed a WARN Act suit against the Employer's conduct in this case, and is engaged in ongoing pretrial discovery in that case.

[4] The Employer formally informed the Union of its impasse implementation of these matters much later, on September 24.

[5] This requested information dealt with the timing of the Employer's claimed impasse, subcontracting of the entire machine shop, and hiring of permanent replacements.

[6] See Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964).

[7] Bob's Big Boy, 264 NLRB 1369 (1982); See also Torrington Industries, 307 NLRB 809 (1992); Power Inc., 311 NLRB 599 (1993), enfd. 40 F.3d 409 (D.C. Cir. 1994); Furniture Rentors of America, 311 NLRB 749 (1993), enf. denied in rel. part 36 F.3d 1240 (3d Cir. 1994); and Acme Die Casting, 315 NLRB 202 (1994); Dorsey Trailers, Inc., 321 NLRB 616 (1997). Cf., Oklahoma Fixture Co., 314 NLRB 958 (1994).

[8] 303 NLRB 386 (1991), enfd. in rel. part 1 F.3d 24 (D.C. Cir. 1993).

[9] Metropolitan Edison co. v. NLRB, 460 U.S. 693 (1983).

[10] AGA Gas, Inc., 307 NLRB 1327, 1330 (1992).

[11] See also Davis Electric Wallingford Corp., 318 NLRB 375 (1995)(mere fact that union had only filed grievances against subcontracting involving layoffs not a waiver of bargaining over subcontracting in non-layoff circumstances). [12] See, e.g., C & S Industries, Inc., 158 NLRB 454, 456-458 (1966); Arco Electric Co., 237 NLRB 708 (1978), enfd. 618 F.2d 698 (10th Cir. 1980); Tel Plus Long Island, 313 NLRB No. 47, slip op. at 15-16 (November 26, 1993); Brown Co., 278 NLRB 783 (1986), enfd. 833 F.2d 1015 (9th Cir. 1987), cert. denied 485 U.S. 1039 (1988).

[13] See, e.g., Paramount Potato Chip Company, Inc., 252 NLRB 794, 797 (1980).

[14] 452 U.S. 666 (1981).

[15] See Bethlehem Steel Co., 147 NLRB 977 (1964), on remand from Industrial Union of Marine Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (unremedied unilateral changes precluded legally cognizable impasse). Accord: Dahl Fish Co., 279 NLRB 1084, n. 3 (1986), enfd. 125 LRRM 3063 (D.C. Cir. 1987)(good faith impasse precluded by unremedied unlawful layoffs and transfer of work); Palomar Corp., 192 NLRB 592 (1971), enfd. 465 F.2d 731 (5th Cir. 1972) (employer refusal to provide relevant information precluded bona fide impasse to permit unilateral reduction in wages); Roytype Division, Pertec Computer Corp., 284 NLRB 810, 812 (1987)(denial of relevant information precluded lawful impasse concerning subcontracting and work relocation). [16] Wayne's Dairy, 223 NLRB 260, 265 (1976); J.R.R. Realty Co., 301 NLRB 473, n. 2 (1991); White Oak Coal Co., Inc., 295 NLRB 567, 568 (1989).

[17] See NLRB v. Katz, supra; Taft Broadcasting, 163 NLRB 475 (1967).

[18] 321 NLRB 1386 (1996), on remand from NLRB v. McClatchy Newspapers, 964 F.2d 1153 (D.C. Cir. 1992).

[19] Colorado-Ute Electric Ass'n, 295 NLRB 607 (1989), enf. den. 939 F.2d 1392 (10th Cir. 1991), cert. den. sub nom. IBEW Local No. 111 v. Colorado-Ute Electric Ass'n, 504 U.S. 955 (1992).

[20] Colorado-Ute, 295 NLRB at 608-10 (Board held that a proposal for unlimited management discretion in determining merit wage increases required the union's waiver of its statutory rights under Section 8(a)(5) of the Act).

[21] See also "Guideline Memorandum Concerning Dubuque Packing Co., Inc., 303 NLRB No. 66," Memorandum GC 91-9, dated August 9, 1991 at p. 4 (hereinafter GC Guideline).

[22] See Noblit Brothers, Inc., 305 NLRB 329, 330 (1992); Holly Farms Corp., 311 NLRB 273, 277-278 (1993), enfd. on other issues 48 F.3d 1360, 148 LRRM 2705 (4th Cir. 1995), affd. ___U.S. ___, 152 LRRM 2001 (1996).

[23] Dubuque, 303 NLRB at 391; GC Guideline at pp. 4-6.

[24] See First National Maintenance, 452 U.S. at 677.

[25] See, e.g., The Topps Co., Inc., Case 4-CA-25444, Advice Memorandum dated April 28, 1997 (decision to close a plant and subcontract the plant's production work was mandatory subject of bargaining).

[26] 269 NLRB 891 (1984). See also The Reece Corp., 294 NLRB 448, 449-450 (1989); Michigan Ladder Co., 286 NLRB 21, 29 (1987).

[27] With regard to the continuing validity of cases that used this dichotomy in interpreting the "change in scope or direction of the enterprise" prong of Otis, see GC Guideline at p. 5 and Waltrec American Forgings, Case 34-CA-6698, Advice Memorandum dated May 15, 1995. Although the Otis dichotomy appears superficially inconsistent with the Dubuque formula, which considers the relationship of labor costs to the decision only after the GC makes out a prima facie case that the decision was not accompanied by a basic change in the employer's operation, arguably the Board's reallocation of the burdens of proof in Dubuque did not change the substantive definitions of long-established terms such as "change in nature of the enterprise." See 303 NLRB at 392. Thus, although the General Counsel no longer is required to show a decision turned on labor costs (rather, the employer must demonstrate labor costs were not a factor assuming the prima facie case has been met), the General Counsel may rely on the fact that a decision turned on labor costs as part of his prima facie showing that a decision did not involve a change in the scope or direction of the enterprise. The Otis dichotomy is consistent with the well-established rationales of Fibreboard and First National Maintenance that issues amenable to collective bargaining should be bargained, and those that are not - because they involve entrepreneurial concerns the union could not address - should not.

[28] See also Summit Tooling Co., 195 NLRB 479 (1972), enfd. 474 F.2d 1352 (7th Cir. 1973), where the employer stopped manufacturing and selling tools and became exclusively a tool design company. That case is also distinguishable because that employer decided to completely close an independent and severable aspect of its business.

[29] 286 NLRB 21 (1987).

[30] See also The Topps Company, Inc, supra.

[31] 350 F.2d 108, 111 (8th Cir. 1965), denying enf. to 137 NLRB 815 (1962).

[32] The Board later said in Otis, 269 NLRB at 893, that it agreed with the 8th circuit's rationale in Adam's Dairy and would find that kind of employer decision to be a nonmandatory subject of bargaining if presented with similar facts again.

[33] 274 NLRB 113 (1985).

[34] 273 NLRB 462 (1984).

[35] The Board also relied heavily on the Otis dichotomy; i.e., it found that the employer's decision constituted a change in the nature of the enterprise because it did not turn on labor costs. As discussed, above, with reference to the Garwood-Detroit case, the instant case is distinguishable because the Employer's decision turned on labor costs.

[36] See also Bostrom Division, UOP, Inc., 272 NLRB 999 (1984) (employer's decision to consolidate operations and subcontract work was non-mandatory because it turned on the employer's inability to compete because of an "outmoded" operation); compare Pertec Computer, 284 NLRB 810 (1987), enfd. 926 F.2d 181 (2d Cir. 1991) (employer closed a facility that manufactured typewriter ribbons and cartridges, relocated some of the work, and subcontracted the rest to a Mexican manufacturer; that was not a fundamental change in the nature of the business because the employer did not change the products, manufacturing process, or technology of production, but merely was having essentially the same work done by other employees in other locations).

[37] See Noblitt Bros., 305 NLRB at 330; Holly Farms, 311 NLRB at 278.

[38] Fraser Shipyards, Inc., 272 NLRB 496 (1984)

[39] The Board noted that at the time of its announcement, the employer had only one ship scheduled for machinery work, with tentative commitments for only two others, and would have had to lay off its machinery employees.

[40] See Reece Corp., 294 NLRB 448 (1989) (closure of facility and relocation of work to other facilities mandatory, under Otis, despite significant capital transactions involved).

[41] See Holmes & Narver, 309 NLRB 146 (1992) (Dubuque test applies to relocations, which involve complicated capital decisions, and not to simple subcontracting).

[42] See, e.g., Reliable Tool Co., 268 NLRB 101, 101 (1983).

[43] Hickinbotham Bros. Ltd., 254 NLRB 96, 103 (1981), cited in Barry-Wehmiller, 271 NLRB 471, 473 (1984).

[44] See, e.g., Wisconsin Steel Industries, 318 NLRB 212, 222 (1995) (employer insisted on "bargaining from scratch" and, without valid excuse, reneged on every tentative agreement the parties had achieved over the course of months of bargaining); ConAgra, Inc., 321 NLRB 944, 945 (1996), enf. den. 117 F.3d 1435 (D.C. Cir. 1997) (totality of employer's conduct, both at and away from the bargaining table, including its refusal to provide supporting data for its repeated claims of inability to pay, demonstrated intent to avoid bargaining and cause a strike).

[45] See, e.g., Pacific Grinding Wheel Co., 220 NLRB 1389, 1390 (1975), enfd. 572 F.2d 1343 (9th Cir. 1979) (progressively regressive proposals without any evidence that they were motivated by economic considerations).

[46] See, e.g., Barry-Wehmiller Co., 271 NLRB at 472-473 (employer lawfully made regressive proposals where, after good-

faith negotiations, it had successfully weathered strike and where proposals were based on changes in operations); and Reliable Tool Co., 268 NLRB at 101 (employer did not "sidetrack" forward-moving process by introducing new proposals where negotiations had been at a standstill for two months, parties had agreed that all agreements were tentative, and where proposals, although found by the ALJ to be substantially more unfavorable to the union than earlier positions taken by the employer, were not so "harsh, vindictive, or otherwise unreasonable" that they warranted the presumption that they were proffered in bad faith).

[47] 288 NLRB 387 (1988).

[48] Cf. L.W. LeFort Co., 290 NLRB 344 (1988)(lawful regressive proposals post-strike where parties had first reached good faith impasse).

[49] See, e.g., Branch International Services, Inc., 310 NLRB 1092, 1103-1105.

[50] Hess Oil & Chemical Corp., 167 NLRB 115, 117 (1967), aff'd, 415 F.2d 440 (5th Cir. 1967), cert. denied, 397 U.S. 916 (1970); United States Pipe & Foundry, 180 NLRB No. 61 (1969), enforced sub. nom., Molders Local 155 v. NLRB, 76 LRRM 2133 (D.C. Cir. 1971).

[51] See Hess Oil, supra; U.S. Pipe and Foundry, supra. See also Bagel Bakers Council, 174 NLRB 622 (1979), enforced in relevant part, 434 F.2d 884 (2d Cir. 1970), cert. denied, 402 U.S. 908 (1971) (lockout tainted where employer's refusal to provide financial information thereby precluding meaningful discussion on the major issue between the parties, prolonged the lockout.)

[52] Movers & Warehousemen's Association of Metropolitan Washington, D.C., 224 NLRB 356 (1976).

[53] See also Horsehead Resource Development Co., Inc., 321 NLRB 1404 at note 6 (1996)(lockout unlawful as "related to the Respondent's prior bad faith bargaining conduct" where Respondent announced lockout imposition "unless the Union agreed to the Respondent's bargaining demands.).

[54] Specifically, the Board found that: (1) the employer's insistence on a change in unit did not frustrate collective bargaining or contribute to impasse on other issues; (2) the employer had not conditioned the signing of contract upon the union's acceptance of the unit change; (3) the union's rejection of the employer's contract proposals was due neither "solely" nor even "primarily" to the inclusion of the unit change; (4) the employer would have locked out its employees even if the unit change issue had been withdrawn from negotiations; (5) the lockout was not prompted by antiunion animus.

[55] Land Air Delivery, 286 NLRB 1131 (1987); International Paper Co., 319 NLRB 1253 (1995).

[56] NLRB v. Acme Industrial Co., 385 U.S. 432 (1967)

[57] Coca Cola Bottling Company of Chicago, 311 NLRB 424 (1993).

[58] 289 NLRB 615 (1988).